Supreme Court, U.S.
FILED
DEC 10 2004
OFFICE OF THE CLERK

(2)

No. 04-356

In the Supreme Court of the United States

OSCAR W. EGERVARY, PETITIONER

v.

VIRGINIA YOUNG, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioner could not establish an essential element of his claim because he could not demonstrate that a district court's decision to permit the removal of his child without the opportunity for a hearing was proximately caused by the actions of the respondents.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A25) is reported at 366 F.3d 238. The opinion of the district court (Pet. App. D1-D104) is reported at 159 F. Supp. 2d 132.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 2004. Pet. App. A1. A petition for rehearing was denied on June 15, 2004 (Pet. App. G1). The petition for a writ of certiorari was filed on September 13, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This is an action under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), arising from an international child custody dispute. Petitioner alleges that three private attorneys violated his due process rights by requesting and executing an *ex parte* order, issued by a federal district court, for the removal of his child. He also alleges that the federal respondents, two Department of State employees implementing the Government's responsibilities under the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention), *done on* Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89, 51 Fed. Reg. 10,498 (1986), violated his due process rights by encouraging or aiding the private attorneys in this endeavor. The court of appeals held that summary judgment in favor of all respondents was appropriate because their actions did not proximately cause petitioner's deprivation of due process; rather, the erroneous, *ex parte* order issued by the court was an independent, superseding cause of the deprivation.

1. The Hague Convention, implemented in the United States by the International Child Abduction Remedies Act (ICARA), 42 U.S.C. 11601 *et seq.*, requires that a child who is removed in violation of the custody rights of a parent or another person be returned promptly to the child's habitual residence, regardless of the child's nationality. State and federal district courts have concurrent jurisdiction over claims arising under the Hague Convention and are empowered to order the return of abducted children. 42 U.S.C. 11603.

Both the Hague Convention and the ICARA require the designation of a "Central Authority" to discharge the duties of the United States under the Convention.

Hague Convention, Art. 6; 42 U.S.C. 11606. The Central Authority for the United States is the Bureau of Consular Affairs in the Department of State. 22 C.F.R. 94.2. Consular Affairs cooperates with the Central Authorities of other countries who are parties to the Hague Convention and with appropriate state authorities "to secure the prompt location and return of children wrongfully removed to or retained in" any country subject to the Convention. 22 C.F.R. 94.3.

The Central Authority accepts applications for assistance "in locating a child, securing access to a child, or obtaining the return of a child that has been removed or retained in breach of custody rights." 22 C.F.R. 94.5. It also assists applicants by confirming or seeking to ascertain the child's location and welfare; seeking through appropriate authorities a voluntary agreement for suitable visitation rights; assisting applicants in securing information useful for choosing legal representation; and monitoring all cases in which assistance has been sought. 22 C.F.R. 94.6.

2. Petitioner emigrated to the United States from Hungary in 1980 and became a U.S. citizen in 1987. He married Aniko Kovacs, a Hungarian national then residing in the United States, in 1991. Their son, Oscar Jonathan Egervary, was born on July 4, 1992. Petitioner claims that Kovacs traveled to Hungary with Oscar in February 1993 and later separated from petitioner and stayed in Hungary with the child. Petitioner subsequently located Kovacs and the child, and took Oscar from Kovacs and returned to the United States. Pet. App. A4, D4.

In April 1994, at Ms. Kovacs' request, the Government of Hungary transmitted an application to the Department of State under the Hague Convention, seeking the return of Oscar to Ms. Kovacs. Pet. App. A5.

The application stated that the father had forcibly abducted the child from Ms. Kovacs in the child's habitual residence in Hungary and removed him to Monroe County, Pennsylvania. *Id.* at A4; C.A. App. 570, 584.

Respondent Virginia Young, then an official in the Child Custody Division of the Office of Citizens Consular Services, called respondent Frederick Rooney, an attorney practicing near Monroe County, Pennsylvania, to inquire whether he would be willing provide legal representation to Ms. Kovacs in a petition for return of the child pursuant to the Hague Convention. Rooney accepted the representation, and Young thereafter forwarded to Rooney various materials, including Hungarian custody orders, letters from the Hungarian government, and the Hungarian government's petition invoking the Hague Convention. Pet. App. A4-A5.

Young also referred Rooney to model legal pleadings and forms concerning petitions under the Hague Convention and ICARA, published by the American Bar Association (ABA). Pet. App. A5. Those pleadings included a "Petition for Return of Child to Petitioner," which contained a paragraph stating that the respondent shall be given notice of hearings in the case. C.A. App. 587-590. Rooney ultimately filed a petition that included that paragraph. *Id.* at 576-580.

Another model pleading, captioned "Warrant in Lieu of Writ of Habeas Corpus," contained three remedial options, requesting that the child be (1) brought before the court for an immediate hearing; (2) placed in a juvenile shelter until a hearing is "promptly" conducted; or (3) placed in the custody of the petitioner, who must "immediately" schedule a hearing and may not remove the child from the county. C.A. App. 591-592; Pet. App. A5. Rooney, along with his co-counsel James Burke, prepared a Warrant in Lieu of Writ of Habeas Corpus

that contained the three options contained in the model pleadings. Rooney also added an additional, fourth option, which provided: "Take into protective custody Oscar Jonathan Egervary and deliver him to Petitioner's agent for immediate return to the physical custody of Petitioner." Pet. App. A5; C.A. App. 586. Rooney did not rely upon the advice of anyone at the Department of State when he included the fourth option, and does not recall informing anyone at the State Department of the option prior to filing the petition. *Id.* at 526, 536. Rooney stated in his deposition that he included the fourth option based upon his belief that the courts in Hungary had awarded custody to Ms. Kovacs, and therefore the petition sought merely to enforce an existing Hungarian court order. *Id.* at 536.

Rooney and Burke filed the Petition and Warrant in the United States District Court for the Middle District of Pennsylvania on May 13, 1994, and Rooney appeared for an *ex parte* conference with United States District Judge Nealon the same day. Pet. App. A5-A6, C.A. App. 202-203. During the meeting, Judge Nealon expressed some concern about authorizing the child's immediate removal from the United States (as provided by Rooney's fourth option) without first providing petitioner an opportunity to be heard. Pet. App. A6; C.A. App. 538, 540-542. He asked Rooney to check with the Department of State to determine whether the Department believed that a child may be returned in such a manner. *Ibid.*

During a break in the meeting, Rooney called the Department of State and spoke to an employee, respondent James Schuler, and stated that the judge "appears to be willing to sign an order for the child to be returned, but he wants to just be sure that that's within his authority." C.A. App. 538. Schuler replied (as

paraphrased by Rooney): "he's the judge. He's got the authority to make whatever decision he wants." *Id.* at 538, 542; Pet. App. A6.

Rooney then reported to Judge Nealon that the Department of State agreed that the judge had authority to order the immediate return of the child. Pet. App. A6; C.A. App. 620. Judge Nealon signed the order, electing the fourth option that provided for immediate return of the child. Rooney and Burke thereafter went to the United States Marshal's office for assistance in executing the order. Rooney and Burke accompanied the Marshals to petitioner's home, where the Marshals retrieved the child. Pet. App. A8.

Rooney then directed an associate in his office, Lori Mannicci, to make travel arrangements to return the child to Europe. Because Rooney did not have Oscar's passport, his associate contacted the Department of State Office of Passport Services to arrange for a passport waiver. After obtaining the passport waiver, Rooney took the child to Frankfurt, Germany, where Kovacs was waiting for them. Pet. App. A8.

Following Oscar's removal, petitioner filed a motion for reconsideration of the district court's *ex parte* order. He subsequently withdrew the motion, however, choosing to litigate custody in the Hungarian courts. Pet. App. A8.

3. Petitioner brought this action in the United States District Court for the Eastern District of Pennsylvania, naming as defendants the three attorneys who represented his ex-wife (Rooney, James Burke, and their local counsel Jeffrey C. Nallin), and the federal respondents, Young and Schuler. The complaint alleged that the respondents had conspired to deprive petitioner of his due process rights under the Fifth Amendment by obtaining a court order for the removal

of his son without notice and an opportunity for a hearing.

After venue was transferred to the Middle District of Pennsylvania, the district court granted the federal respondents' motion to dismiss the complaint, finding that petitioner did not allege that the *ex parte* nature of the court proceeding was in any way directed by, approved of, or within the knowledge of the federal respondents. Petitioner thereafter successfully moved to transfer venue back to the Eastern District of Pennsylvania. Pet. App. A9.

The case against the three attorney defendants was then assigned to a new judge, and discovery was conducted without the presence of the federal respondents. In an August 2000 ruling, the district court granted summary judgment for respondent Nallin, concluding that he was not acting as a federal agent because he did not participate in the execution of the ex parte order. Pet. App. A10, E9. The court concluded, however, that because respondents Rooney and Burke participated in execution of the order, they were acting as federal agents and could be subject to *Bivens* liability. *Id.* at A10, E9-E10. The court then concluded that the "good faith" defense raised by Rooney and Burke could not be resolved at the summary judgment stage, but instead presented a jury question to be resolved at trial. *Id.* at A10, E12-E13. In a footnote to its opinion, the district court stated that if the claim "that the State Department suggested Oscar could be returned to Hungary after an *ex parte* hearing is correct, then Young and Schuler bear a great deal of responsibility for the violation of [petitioner's] constitutional rights, even if they cannot be held accountable in these proceedings." *Id.* at E3 n.2.

In February 2001, petitioner moved to amend his complaint to add Young and Schuler as defendants in the case, alleging that they conspired to deprive petitioner of his due process rights by seeking an order removing his son without a hearing. C.A. App. 198-209. The district court granted petitioner leave to amend his complaint without waiting for a response to the motion. Pet. App. A11-A12.

4. The federal respondents moved to dismiss the amended complaint, and later moved for summary judgment, arguing among other things that they are entitled to qualified immunity. The district court, in a lengthy opinion, indicated that it would deny both motions. Pet. App. D1-D104. On the issue of qualified immunity, the district court held that petitioner's due process rights were violated when his son was removed without either prior notice or a prompt, state-initiated post-deprivation hearing. *Id.* at D57-D60. The court then concluded that petitioners' right to due process was clearly established at the time of the alleged violation, citing cases involving allegations that state officials removed a child from a parent's custody without sufficient opportunity for a hearing, and holding that it is an "obvious inference" to apply the general due process right discussed in those cases to the federal respondents here. *Id.* at D61-D67. The district court then held that "a jury could reasonably conclude that the federal [respondents] conspired with, gave substantial assistance or encouragement to, and/or ordered or induced Rooney['s]" actions. *Id.* at D102.

The district court then certified a number of its orders for interlocutory appeal under 28 U.S.C. 1292(b), including the order denying summary judgment to the federal respondents, the order denying summary judgment to Rooney and Burke, and the order granting

summary judgment to Nallin. Pet. App. A12. The federal respondents thereafter filed a notice of appeal with respect to qualified immunity, and also sought permission to appeal the remainder of the district court's adverse order under Section 1292(b). Rooney and Burke also sought permission to appeal, and petitioner did the same with respect to the grant of summary judgment to Nallin. The court of appeals granted all of the requests for permission to appeal and consolidated the appeals. *Ibid.*

5. The court of appeals reversed the district court's denial of summary judgment to respondents Rooney, Burke, Young and Schuler, remanding with directions to enter summary judgment in their favor, and affirmed the grant of summary judgment in favor of respondent Nallin. Pet. App. A1-A25. The court of appeals concluded that it need not reach a number of defenses raised by respondents, including lack of venue, absolute and qualified immunity, and good faith, because "we conclude that Egervary, by failing to demonstrate proximate cause with respect to any defendant, has failed to establish an essential element of his claim." *Id.* at A14.

The court stated that it would "adhere to the well-settled principle that, in situations in which a judicial officer or other independent intermediary applies the correct governing law and procedures but reaches an erroneous conclusion because he or she is misled in some manner as to the relevant facts, the causal chain is not broken and liability may be imposed upon those involved in making the misrepresentations or omissions." Pet. App. A23. The court of appeals distinguished that circumstance from the situation presented in this case, "where the actions of the defendants, while clearly a cause of the plaintiff's harm, do not create liability be-

cause of the intervention of independent judicial review, a superseding cause." *Ibid.* The court explained:

> No statement or omission by [respondents] could possible have made the issuance of [the judge's] order appropriate. Rather, the judge's execution of an order permitting Oscar's removal from the United States without either a pre- or post-deprivation hearing amounted to an error of law for which the judge alone was responsible.

Ibid. The court therefore concluded "that where, as here, the judicial officer is provided with the appropriate facts to adjudicate the proceeding but fails to properly apply the governing law and procedures, such error must be held to be a superseding cause, breaking the chain of causation for purposes of § 1983 and *Bivens* liability." *Ibid.*

The court of appeals also observed that neither the district judge's error in granting the order nor the execution of the order left petitioner without a remedy. The court explained that petitioner could have pursued his motion to reconsider and appealed a denial of that motion. "A reversal by this Court then would have permitted [petitioner] to enlist the aid of the State Department in obtaining Oscar's return. [Petitioner] instead chose to withdraw his motion for reconsideration and pursue the *Bivens* claim. While it was clearly his right to do so, he is now left with the consequences of that decision." Pet. App. A24-A25.

ARGUMENT

The court of appeals held that, where a district court is provided with the appropriate facts upon which to render a decision, the independent decision by that court to issue an *ex parte* order depriving petitioner of

the custody of his child constituted a superseding cause that prevents the imposition of *Bivens* liability on the respondents accused of obtaining and executing the judicial order in question. That decision rests upon a fact-specific and proper interpretation of common law and does not warrant review by this Court.

1. The question presented as framed by petitioner is whether the court of appeals "properly extended absolute immunity" to the respondents in this case. Pet. i. Despite petitioner's repeated attempts to characterize the court of appeals' decision as an unwarranted "extension of absolute immunity" (see, *e.g.*, Pet. 9, 11, 12, 13), however, the court of appeals expressly declined to address whether any of respondents were entitled to absolute (or qualified) immunity. Pet. App. A13-A14. The court instead based its decision upon an application of common law principles of causation. *Id.* at A14-A24.

Significantly, petitioner makes no attempt to challenge the court of appeals' holding with respect to causation. Because the question of causation is distinct from the question of absolute immunity, petitioner's failure to present that issue in the petition is fatal. Sup. Ct. R. 14(1)(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); see Sup. Ct. R. 24(1)(a) (brief may not raise questions not presented in the petition for certiorari). Because the only question presented in the petition concerns an issue upon which the court of appeals did not rule, the petition should be denied.

2. Even if petitioner had presented a challenge to the court of appeals' determination with respect to causation, certiorari would not be warranted. Liability under *Bivens*, as under 42 U.S.C. 1983, is determined "against the background of tort liability that makes a man responsible for the natural consequences of his ac-

tions." *Monroe* v. *Pape*, 365 U.S. 167, 187 (1961). Thus, this Court has "examined common-law doctrine when identifying both the elements of the cause of action and the defenses available to state actors." *Kalina* v. *Fletcher*, 522 U.S. 118, 123 (1997); see *Heck* v. *Humphrey*, 512 U.S. 477, 483 (1994) (recognizing that the common law of torts provides the appropriate starting point for liability under Section 1983).

Applying common law principles of causation in traditional tort law, the court of appeals correctly found that an independent decision by a federal judge is a superseding cause that breaks the chain of causation. Pet. App. A23. The court of appeals made clear, however, that the decision of a judicial officer or independent intermediary does not break the chain of causation if the judge "is misled in some manner as to the relevant facts." *Ibid.* In this case, the purported misrepresentation involved purely a legal issue—whether, under any set of facts presented to the district court, "minimal due process required providing [petitioner] with an opportunity to be heard prior to [his child's] removal from the United States." *Id.* at A22. That determination was ultimately made by the judge, whose issuance of the order "amounted to an error of law for which the judge alone was responsible." *Id.* at A23. The court of appeals thus correctly concluded that the judge's independent legal conclusion broke the chain of causation.

The court of appeals' decision applied settled common law principles. First, an actor is responsible for consequences caused by "reasonably foreseeable intervening forces." *Gutierrez-Rodriguez* v. *Cartagena*, 882 F.2d 553, 561 (1st Cir. 1989) (quoting *Marshall* v. *Perez Arzuaga*, 828 F.2d 845, 848 (1st Cir. 1987), cert. denied, 484 U.S. 1065 (1988)). Second, however, an "intervening exercise of independent judgment" breaks the

causal chain. *Townes* v. *City of New York*, 176 F.3d 138, 147 (2d Cir.), cert. denied, 528 U.S. 965 (1999). Thus, "[a] superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." Restatement (Second) of Torts 2d § 440 (1965).

Where the defendant misleads the decisionmaker with respect to the relevant facts, the intervening act of the decisionmaker is not truly an exercise of independent judgment, and therefore does not break the chain of causation. By contrast, where, as here, the alleged misconduct concerns a legal issue within the expertise of an Article III judge, the judge's decision is an independent act that breaks the causal chain. That distinction, which forms the basis of the court of appeals' decision, is consistent with the uniform decisions of the courts of appeals. See, *e.g.*, *Townes*, 176 F.3d at 147; *Robinson* v. *Maruffi*, 895 F.2d 649, 655-656 (10th Cir. 1990); *Barts* v. *Joyner*, 865 F.2d 1187, 1195 (11th Cir.), cert. denied, 493 U.S. 831 (1989); *Hand* v. *Gary*, 838 F.2d 1420, 1427-1428 (5th Cir. 1988); *Smiddy* v. *Varney*, 665 F.2d 261, 266-268 (9th Cir. 1981), cert. denied, 459 U.S. 829 (1982); *Duncan* v. *Nelson*, 466 F.2d 939, 943 (7th Cir.), cert. denied, 409 U.S. 894 (1972).

In this case, a private attorney presented four options to an experienced federal judge, three of which involved a prompt post-deprivation hearing. The judge, exercising his independent judgment, chose the fourth option at the urging of the private attorney, concluding that it was unnecessary to provide even a post-deprivation hearing in this case. The court of appeals' holding that the independent and purely legal conclusion of the district judge breaks the chain of causation is correct and does not warrant further review.

That conclusion is particularly true with respect to the federal respondents, who petitioner seeks to hold responsible for *two* legal judgments independent and removed from the their conduct. First, a private attorney (Rooney) used his own legal judgment in deciding to add a fourth option that eliminated a post-deprivation hearing. Second, an experienced federal judge exercised his authority under Article III of the Constitution and issued an *ex parte* order without a pre- or post-deprivation hearing.

3. Petitioner's contention (Pet. 13) that the court of appeals' decision is inconsistent with this Court's decision in *Malley* v. *Briggs*, 475 U.S. 335 (1986), is misplaced. In *Malley*, this Court held that a law enforcement officer who requested an arrest warrant when no reasonable officer would conclude that the affidavit established probable cause was not entitled to absolute immunity or to qualified immunity, even if the warrant is approved by the magistrate. *Id.* at 345-346. *Malley*'s rejection of absolute immunity is not controlling here. As discussed, the court of appeals did not hold that any of the respondents are entitled to absolute immunity, and did not purport to rule on the question of qualified immunity.

The causation issue upon which the court of appeals ruled in this case was not presented in *Malley*. As the Court stated, the petitioner in that case had "not pressed the argument that in a case like this the officer should not be liable because the judge's decision to issue the warrant breaks the causal chain between the application for the warrant and the improvident arrest." 475 U.S. at 344 n.7. In dictum, this Court then noted that the district court's "no causation" rationale "is inconsistent with our interpretation of § 1983," noting that "[s]ince the common law recognized the causal

link between the submission of a complaint and an ensuing arrest, we read § 1983 as recognizing the same causal link." *Ibid.*

As the court of appeals recognized (Pet. App. A18), the statement in *Malley* merely incorporates the common law "traditional tort concepts of independent, intervening cause." This Court recognized the direct causal link between a complaint and an ensuing arrest, and did not purport to establish standards by which common law principles must be applied in future cases under other circumstances respecting the quite different context of a legal argument to an Article III court concerning what process is due. The court of appeals' decision here is fully consistent with common law principles, recognizing that in the absence of a factual misstatement or undue pressure, an independent legal conclusion by an experienced Article III judge constitutes an intervening cause.

Moreover, this Court would need to extend *Malley* to apply it to the federal respondents. Those individuals made no direct request to the court and did not personally appear before the court that issued the order. Nor did they supervise Rooney in the decision to seek an *ex parte* order—indeed, the undisputed evidence shows that Rooney developed his strategy as a result of his independent judgment. C.A. App. 536. At no point did *Malley* suggest that a government official who does not seek an order or participate in the hearing can be held liable when a district court issues an order that violates the Constitution. Indeed, courts have recognized that a supervisor who requests that a warrant be obtained, but does not play a role in obtaining or executing the warrant, may not be held liable if the subordinate officer later obtains the warrant without showing probable

cause. *Berg* v. *County of Allegheny*, 219 F.3d 261, 274-275 (3d Cir. 2000), cert. denied, 531 U.S. 1072 (2001).

Nor is there any other basis upon which to conclude that two Department of State employees, who are not lawyers, should be personally liable for the independent legal conclusions of a private attorney and an experienced federal judge. Young contacted Rooney to inquire whether he would represent petitioner's ex-wife, referred Rooney to ABA model pleadings, and maintained some contact with Rooney during the process. Schuler is alleged to have stated to Rooney during a telephone call, during which he was not told that the hearing was *ex parte*, that the judge has "the authority to make whatever decision he wants." No clearly established law could put the federal respondents on notice that their actions would make them responsible for Rooney's independent decision to seek the removal of plaintiff's child without a hearing, as well as for the judge's independent decision to grant that request. *Blum* v. *Yaretsky*, 457 U.S. 991, 1004-1005 (1982) ("Mere approval of or acquiescence in the initiatives" of a private party is insufficient to make the private party's actions that of the Government.). Accordingly, even if one looks past the court of appeals' decision with respect to causation, certiorari is unwarranted with respect to the federal respondents because there is no basis upon which to deny those respondents qualified immunity.

The facts of this case are unfortunate, but they are also quite unusual. There are alternative grounds, such as qualified immunity, for reaching the result below that are not encompassed in the petition. This case is not an appropriate candidate for plenary review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2004